86-64

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

DR. JACK MARVIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I.

QUESTION PRESENTED

WHETHER THE PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED WHERE THE PETITIONER WAS CONVICTED OF AIDING AND ABETTING THE UNLAWFUL ACQUISITION AND POSSESSION OF FOOD STAMP COUPONS WITHOUT ANY INSTRUCTION OR PROOF THAT THE JURY FIND THAT THE PETITIONER HAD *KNOWLEDGE* THAT SUCH ACQUISITION OR POSSESSION WAS DONE IN AN UNAUTHORIZED MANNER, IN VIOLATION OF THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *LIPAROTA v. UNITED STATES,* 105 S.CT. 2084 (1985), WHICH HOLDS THAT SUCH KNOWLEDGE IS AN ESSENTIAL ELEMENT OF THE OFFENSE STATED ABOVE.

PARTIES

United States of America and Jack L. Marvin.

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No.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit (No. 85-2229WM), whose judgment is herein sought to be reviewed, was filed on April 18, 1986. This opinion is set forth in the Appendix at 1-a through 2-a and is not reported. The Order of the United States District Court for the Western District of Missouri is set forth in the Appendix at 3-a through 5-a and also is not reported.

The Opinion of the United States Court of Appeals for the Eighth Circuit (No. 81-2255WM), whose judgment formed the basis of this present case, was decided and filed on September 3, 1982. This opinion is reported in 687 F.2d 1221 (8th Cir. 1982).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 1986, affirming the District Court Order denying Petitioner's Motion to Set Aside the Judgment and Sentence pursuant to 28 U.S.C. Section 2255.

This petition is filed within ninety (90) days of the judgment of the Court of Appeals. This Court has jurisdiction pursuant to 28 U.S.C. Section 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitutional Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On September 18, 1981, before the United States District Court, the Petitioner was found guilty on one count of unlawfully acquiring and possessing food stamp coupons in violation of 7 U.S.C. Section 2024(b) and on two counts of aiding and abetting the violation of 7 U.S.C.

Section 2024(b) in contravention of 18 U.S.C. Section 2. (A. 3-a)[1] The Petitioner was sentenced to one year imprisonment with all but 90 days suspended followed by two years probation.

On September 3, 1982, the United States Court of Appeals for the Eighth Circuit reversed the acquiring and possessing count but affirmed the conviction as to the two charges involving aiding and abetting. *United States v. Marvin,* 687 F.2d 1221 (8th Cir. 1982), *cert. denied,* 103 S.Ct. 1768 (1983). The Eighth Circuit held that the District Court erred in failing to give "specific intent" instructions relative to the substantive offense charge; the jury should have been given the Petitioner's requested instruction that the government had to prove "that the defendant knowingly did an act which the law forbids". *Id.* at 1227. However, the Eighth Circuit also held that there was no error in the instructions given to the jury on the aiding and abetting counts due to the "specific intent" requirement present in those instructions; the jury had to find that the Petitioner acted "willfully" and "with the specific intent to do something the law forbids". *Id.* at 1228. As a result, except for the $5,000 fine which had been imposed on Count I, the sentence imposed upon the Petitioner remained undisturbed. *Id.* at 1230.

Subsequent to the *Marvin* decision, the United States Supreme Court handed down *Liparota v. United States,* 105 S.Ct. 2084 (1985). In *Liparota,* a prosecution for violation of Section 2024(b), the government submitted instructions requiring a finding that "the Defendant knowingly and willfully acquired the food stamps" and that such acquisition and possession was "in a manner not authorized

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1. References herein to "A." are to the Appendix to the Petition.

by federal statute or regulations". *Id.* at 2086. Without passing judgment on the specific intent instruction, the United States Supreme Court reversed the defendant's conviction holding that in a prosecution for violation of Section 2024(b) the government is also required to prove that "the defendant *knew* that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations". (emphasis added). *Id.* at 2092.

Because *Liparota* held that knowledge was an essential element of a 2024(b) offense, an element of the offense not proved by the government in the Petitioner's case, the Petitioner filed a 28 U.S.C. Section 2255 Motion to Set Aside Judgment and Sentence of Court in the United States District Court for the Western District of Missouri on July 22, 1985. (A. 3-a) On September 27, 1985, the District Court issued an order denying the Appellant's motion. (A. 3-a-5-a)

Petitioner timely filed an appeal to the United States Court of Appeals for the Eighth Circuit on October 2, 1985. On April 18, 1986, the Eighth Circuit affirmed the lower court's decision, stating that *Liparota* was "in no way inconsistent" with the earlier opinion in *Marvin.* (A. 1-a-2-a)

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decision of this Court in *Liparota v. United States,* 105 S.Ct. 2084 (1985), regarding the requirement that an individual must be found to have knowledge that the acquisition or possession of food stamp coupons was unlawful before being convicted of an offense involving the violation of 7 U.S.C. Section 2024(b).

I. The Decision Below Conflicts With Applicable Decisions of This Court.

The Petitioner was convicted on one count of unlawfully acquiring and possessing food stamp coupons, in violation of 7 U.S.C. Section 2024(b) and on two counts of aiding and abetting that crime, in violation of 18 U.S.C. Section 2. (A. 3-a) On appeal, the conviction on the substantive offense was reversed. However, the convictions on the other two counts were affirmed. *United States v. Marvin*, 687 F.2d 1221 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 1768 (1983). The basis for the Eighth Circuit's decision was a specific intent analysis. As the Eighth Circuit stated, Congress "did not intend to create what would be for all practical purposes a strict-liability crime" when it enacted Section 2024(b) and that section, therefore, had to include some "requirement of a guilty intent". *Id.* at 1227.

With regard to the unlawful acquisition and possession of food stamps count, the Court held that the failure of the district court to instruct the jury on the mental intent requirement of "specific intent", i.e., "that the defendant knowingly did an act which the law forbids", constituted reversible error. *Id.* at 1227. Such language is the generally recognized language used in jury instructions for specific intent.

With regard to the aiding and abetting counts, the Court held that the "specific intent" requirement *was* present in the instructions given to the jury. The jury was informed that it must find that the Petitioner acted "willfully" and "with the specific intent to do something that the law forbids", in order to find him guilty. *Id.* at 1228. Again, such language is clearly "specific intent" terminology.

In other words, at the time of the Petitioner's appeal in September, 1982, the Eighth Circuit interpreted the scienter requirement of 7 U.S.C. Section 2024(b) as merely requiring that the defendant knew that he had acquired or possessed food stamps. It was not necessary for the government to prove that the defendant also *knew* that such acquisition or possession was done in a manner not authorized by statute or regulation, in order to find a defendant guilty of this crime.

However, this approach was found to be erroneous by the United States Supreme Court's recent decision in *Liparota v. United States*, 105 S.Ct. 2084 (1985). According to *Liparota*, the scienter element of the food stamp statute requires the government to prove not only that the defendant has acquired or possessed food stamps but also that the defendant knows that he has done so in a manner not authorized by statute or regulation. *Id.* at 2092. Therefore, the mere possession of food stamps without authorization, the act for which the Petitioner was convicted of aiding and abetting, is no longer a crime. The *Liparota* decision, in effect, renders the Petitioner's convictions and sentence fundamentally unfair for they were obtained in violation of his constitutional due process right to a fair trial, as the additional element of the offense, i.e., that the acquisition or possession of food stamps was done in an unauthorized manner, was neither proven nor instructed upon in his case.

The Eighth Circuit's opinion in the instant case, affirming the district court's order denying the Appellant's Section 2255 motion (A. 1-a-2-a), failed to take into account the full impact of the *Liparota* decision. Unlike the often criticized specific intent analysis which was used in the *Marvin* case, and which the district court incor-

rectly stated in its Order was used in *Liparota* (A. 3-a-4-a), the *Liparota* decision was based on a different rationale. *Liparota* was decided on the basis of "knowledge", not "specific intent". The Supreme Court's different focus is first demonstrated in its statement of the "question presented" for review:

> "The question presented is whether in a prosecution under this provision (7 U.S.C. Section 2024) the Government must prove that the defendant *knew* that he was acting in a manner not authorized by statute or regulations."

Liparota v. United States, supra, at 2086 (emphasis added). This focus is again shown in the express holding of the majority opinion:

> "We hold that in a prosecution for violation of Section 2024(b), the Government must prove that the defendant *knew* that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations."

(emphasis added). *Id.* at 2092.

The Supreme Court made even more clear the point that the court was deciding the *Liparota* case on the basis of "knowledge", rather than "specific intent", in footnote 16 of the Opinion:

> "Although we agree with petitioner concerning his interpretation of the statute, we express no opinion on the 'specific intent' instruction he tendered. . . . This instruction has been criticized as too general and potentially misleading. . . . A more useful instruction might relate specifically to the mental state required under Section 2024(b) and eschew use of difficult legal concepts like 'specific intent' and 'general intent'."

Id. at 2092-2093, n.16. The Supreme Court, thus, very clearly based its decision in *Liparota v. United States, supra,* not on the absence of a "specific intent" instruction but rather on the incorrect interpretation given to Section 2024(b) by the district court relative to the "knowledge" element. As succinctly observed by Justice White of this Court:

> "Knowingly to do something that is unauthorized by law is not the same as doing something knowing that it is unauthorized by law." *Liparota v. United States, supra,* at 2093-2094.

The seeming simplicity of this statement was simply ignored by the Eighth Circuit. Regardless of how extensive the Eighth Circuit's discussion on specific intent was, under *Liparota,* the crucial factor was the petitioner's knowledge, not specific intent.

The holding in *Liparota* has already been applied by one circuit to require a showing of knowledge that the action taken was in violation of federal law. *United States v. Schankowski,* 782 F.2d 628 (6th Cir. 1986). In *Schankowski,* the Sixth Circuit held that before being convicted of obstructing the mail in violation of 18 U.S.C. Sections 1700-1710, it must be shown that the defendant knew that the effect of her actions would be to obstruct the mail. *Id.* at 632.

In the present case, no showing was made or required to be found that the Petitioner knew of the unauthorized nature of the acquisition or possession of food stamps in order to be found guilty of the crime of aiding and abetting the unlawful acquisition or possession of food stamp coupons. As a result, the Petitioner was denied his due process right to a fair trial. This result directly conflicts with this Court's holding in *Liparota,* and on this ground, *certiorari* should be granted.

II. The Decision Below Conflicts With the Decisions of Other Courts of Appeals.

The conflict between the use of a specific intent theory, as opposed to a knowledge theory, is exemplified by the approaches taken by several of the circuit courts of appeals. *Marvin* relied on specific intent reasoning. This approach was specifically noted by the Tenth Circuit in *United States v. Salazar,* 720 F.2d 1482 (10th Cir. 1983), which commented that in *Marvin,* a "vagueness challenge to Section 2024(b) failed because specific intent was (held to be) an essential element of the offense."

However, two other circuits which also have dealt with food stamp cases have relied on the knowledge approach, as used by this Court in *Liparota. United States v. Pollard,* 778 F.2d 1177 (6th Cir. 1985); *United States v. O'Brien,* 686 F.2d 850 (10th Cir. 1982). In *O'Brien, supra,* at 853, the court held that the defendant's conviction had to be reversed because the district court had failed "to instruct the jury that knowledge that one's acquisition of food stamps is not authorized by statute or regulation is an essential element of 7 U.S.C. Section 2024(b)." The same point was again made when the court stated that "an essential element of the crime charged was that the O'Briens knew that their acquisition of the coupons was an unauthorized acquisition." *Id.* at 854. In *Pollard, supra,* at 1180, without even questioning the use of the knowledge requirement, the court merely determined whether or not the evidence was sufficient for a jury to find that the defendant "knew she was violating some law or regulation."

Because of the conflict between the circuits regarding the use of a specific intent or a knowledge approach, this Court should grant *certiorari.*

CONCLUSION

For the reasons stated, the Petition should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2229

Jack Marvin,
Appellant,

v.

United States of America,
Appellee.

On Appeal from the United States District Court
for the Western District of Missouri.

Submitted: April 15, 1986
Filed: April 18, 1986

Before ROSS, Circuit Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

PER CURIAM.

In *United States v. Marvin,* 687 F.2d 1221 (8th Cir. 1982), we affirmed convictions of Dr. Jack Marvin on two counts of aiding and abetting violations of 7 U.S.C. §2024(b), which forbids the acquisition and possession of food stamps in a manner not authorized by law. We held that the instructions given the jury in Marvin's trial cor-

rectly required that a finding of specific intent to violate the law be made. Thus, although Marvin's conviction for the substantive offense of violating §2024(b) was reversed for failure to require a jury finding that he knew he was acting contrary to law, his two convictions for aiding and abetting were upheld.

Marvin now brings this post-conviction proceeding under 28 U.S.C. §2255, claiming that the Supreme Court's recent decision in *Liparota v. United States,* 105 S. Ct. 2084 (1985), destroys the basis of this Court's decision on his direct appeal. The District Court[1] dismissed, and we affirm. The appeal is wholly without substance. *Liparota* is in no way inconsistent with out previous opinion. Indeed, it cites our opinion with approval, as an example of one of the circuits which was already applying a correct specific-intent analysis. 105 S. Ct. at 2086-87.

Marvin also claims that the evidence was insufficient to support his convictions, but we have already rejected the claim on his direct appeal, see 687 F.2d at 1230, and, in any event, the claim of insufficiency of the evidence is based upon the same defective theory as the first argument, just rejected, that *Liparota* is inconsistent with *Marvin.*

Afirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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1. The Hon. Russell G. Clark, United States District Judge for the Western District of Missouri.

APPENDIX B

(Filed September 27, 1985)

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 85-0845-CV-W-4-P

DR. JACK MARVIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ORDER

On July 22, 1985, petitioner filed a motion pursuant to § 2255 of Title 28, U.S.C., to set aside judgment and sentence of the Court. Petitioner's motion will be denied.

Petitioner was convicted of three counts of violation of 7 U.S.C. § 2024(b) which prohibits certain food stamp transactions. One count involved the illegal acquisition and possession of food stamp coupons with the remaining two counts involving aiding and abetting a violation of the food stamp transaction statute. The Eighth Circuit reversed the conviction dealing with the acquiring and possessing of food stamp coupons but affirmed the conviction involving the two counts of aiding and abetting. *United States v. Marvin,* 687 F.2d 1230 (8th Cir. 1982).

In his motion to set aside the judgment and sentence of the Court, the petitioner claims that the Eighth Circuit only required a "general" intent to violate the law in construing the statutory requirements under the food stamp statute for "knowledge." Petitioner states that the Eighth Circuit did not require that the defendant have "knowledge" that the transactions were unauthorized by statute or regulation.

In a recent decision of the United States Supreme Court, *Liparota v. United States*, 53 U.S. Law Week 4530 (1985), the Court held that "specific intent" is required in a prosecution under 7 U.S.C. § 2024(b). The petitioner's allegation is that the jury instructions under the aiding and abetting counts did not require the "specific intent" finding and, as such, the jury was erroneously instructed concerning an essential element of the substantive crime. The Eighth Circuit in *United States v. Marvin, supra* at 1228, held that specific intent was a requirement of the substantive offense under 7 U.S.C. § 2024(b) and overturned the petitioner's conviction of that substantive crime when the instructions failed to require "specific intent." However, the Eighth Circuit held that, as to the aiding and abetting statute, "it is clear in context that Marvin was not charged in these two counts with acquiring or possessing food stamps themselves, but rather was helping someone else to do so. And the district court instructed the jury that the defendant could not be convicted of aiding and abetting unless he acted "willfully," and with the "specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law." *Id.* at 1228.

Since counts which were upheld by the Eighth Circuit dealt with the aiding and abetting statute, 18 U.S.C. § 2, the decision of the Supreme Court in *Liparota* has no

direct bearing on the convictions. In those two counts Marvin was not charged with acquiring or possessing food stamps, the statute construed by the Supreme Court in *Liparota,* but in aiding and abetting others in acquiring or possessing food stamps illegally. Even still, the instructions, which were upheld by the Eighth Circuit, given to the jury in dealing with the aiding and abetting counts, did require that the jury find that the petitioner acted "willfully" and with the *specific intent* to do something the law forbids." (emphasis supplied).

Accordingly, the instructions are consistent both the statutory requirements outlined in 18 U.S.C. § 2, and with the *Liparota* decision in that they require "specific intent." Therefore, it is hereby

ORDERED that petitioner's motion to set aside the judgment and sentence of the Court is hereby denied.

/s/ Russell G. Clark
Russell G. Clark, District Judge
United States District Court

Dated: September 27, 1985